APPENDIX E

Table: Legal Status of Individuals Requiring Forensic Treatment

Selected References: Statutes of Virginia Related to the Department of Mental Health Mental Retardation and Substance Abuse Services (Forensic)

LEGAL STATUS OF INDIVIDUALS REQUIRING FORENSIC TREATMENT

LEGAL STATUS	RELEVANT VIRGINIA CODE SECTION	LOCATION
In Jail - Prior to Trial	§19.2-169/6	facility
In Jail - Convicted and Awaiting Sentencing*	§19.2-176	facility
In Jail - Convicted and Serving Local Time	§19.2-177.1	facility
In Jail - Convicted "State Responsible" Felons on way into DOC prison but Needing Emergency Psychiatric Admission	§19.2-177.1	Central State Hospital - Forensic
Incompetent to Stand Trial*	§19.2-169.2	facility
Not Guilty by Reason of Insanity - Commitment*	§19.2-182.3	facility
Dept. Of Corrections Female Transfers**	§53.1-40.2	CSH-Forensic
Dept. Of Corrections Transfers for Inmates Prior to Release in Need of Civil Commitment	§37.1-67.3 as identified in §53.1-40.9	CSH-Forensic

Title 16.1: "Courts Not of Record" (Juvenile and Domestic Relations Court)

Title 37.1: "Institutions for the Mentally Ill; Mental Health Generally"

Title 19.2: "Criminal Procedure" (Insanity, Incompetency to Stand Trail, and Transfers from Jails for Hospitalization)

Title 53.1: "Prisons and other Methods of Correction"

*** These types of forensic admissions do not require preadmission screening by the CSB.**
**** Male Department of Corrections Inmates who require psychiatric hospitalization are admitted to Marion Correctional Treatment Center, a Department of Corrections Facility. Facility = State Hospital.**

Title 19.2.
Criminal Procedure.

CHAPTER 11.

Proceedings on Question of Insanity.

§ 19.2-167. Accused not to be tried while insane or feebleminded. – No person shall, while he is insane or feebleminded, be tried for a criminal offense. (Code 1950, § 19.1-227; 1960, c. 366; 1964, c. 231; 1968, c. 789; 1975, c. 495.)

Law Review. – For note on partial responsibility as a mitigating factor, see 18 Wash. & Lee L. Rev. 118 (1961). For comment on the procedural methods for raising insanity in criminal actions in Virginia, see 18 Wash. & Lee L. Rev. 365 (1961).

Article sets forth procedure for commitment. – This article sets forth the procedure for the commitment to a state hospital for observation of a person charged with crime when there is reason to believe that his mental condition makes such confinement necessary. Barber v. Commonwealth, 206 Va. 241, 142 S.E.2d 484 (1965).

This section is merely declaratory of the common law. Delp v. Commonwealth, 172 Va. 564, 200 S.E. 594 (1939); Thomas v. Cunningham, 313 F.2d 934 (4th Cir. 1963).

Insanity and feeblemindedness are placed on the same plane with respect to criminal liability. Graham v. Gathright, 345 F. Supp. 1148 (W.D. Va. 1972).

Commitment proceedings as to persons accused of crime are for their protection. Timmons v. Peyton, 240 F. Supp. 749 (E.D. Va. 1965), rev'd on other grounds, 360 F.2d 327 (4th Cir.), cert. denied, 385 U.S. 960, 87 S. Ct. 396, 17 L. Ed. 2d 305 (1966).

What emerges from this humane legislation is the assurance by the Commonwealth that one whose mental capacity to cope with the exigencies of a trial is in doubt shall not be put in jeopardy without a preliminary inquiry into his present mental condition. Thomas v. Cunningham, 313 F.2d 934 (4th Cir. 1963); Kibert v. Peyton, 383 F.2d 566 (4th Cir. 1967).

An accused is presumed to be sane at trial unless his mental condition is called into question by proof to the contrary. Thomas v. Cunningham, 313 F.2d 934 (4th Cir. 1963); Poteat v. Peyton, 270 F. Supp. 220 (W.D. Va. 1967); Jefferson v. Commonwealth, 214 Va. 747, 204 S.E.2d 258 (1974).

But he must have opportunity to raise

issue of insanity. – While efforts to overcome the presumption of sanity may be circumscribed by state prescriptions as to the quantum of proof and legal tests of insanity, procedural due process requires that a state shall afford an accused adequate opportunity to raise the issue. Thomas v. Cunningham, 313 F.2d 934 (4th Cir. 1963).

Or the protection is illusory. – The protection afforded the defendant by this section is illusory, however, if, when a reasonable doubt as to his sanity arises, neither court nor counsel seeks to utilize the procedures provided by the state for determining competency. Kibert v. Peyton, 383 F.2d 566 (4th Cir. 1967).

Separate hearing on issue of sanity was unjustified where the court, upon the concurrence of two qualified psychologists, considered defendant mentally competent to stand trial for murder, and the jury affirmed such a conclusion. Wilson v. Cox, 312 F. Supp. 209 (W.D. Va. 1970).

Availability of psychiatric testimony. – The right to a judicial determination of fitness to stand trial is not to be confused with the contention that a state is constitutionally obligated to provide at public expense the services of psychiatrists whose expert testimony may later prove useful in establishing the affirmative defense of lack of criminal responsibility. While the availability of such evidence at state expense may be invaluable to an indigent accused unable to employ his own psychiatrists, this would appear to be a merely incidental consequence of the primary statutory objective of preserving his right to a fair trial by first resolving his mental capacity to understand the charges and the nature of the proceedings against him. Thomas v. Cunningham, 313 F.2d 934 (4th Cir. 1963).

Ake v. Oklahoma to be applied prospectively. – The rule announced in Ake v. Oklahoma, 105 S. Ct. 1087 (1985) (that due process of law was denied where no psychiatrist was appointed to examine the defendant, to help him prepare his case, to serve as an expert witness for the defense, and to assist in the defense at trial) should be applied only to those cases tried subsequent to Feb. 26, 1985. Snurkowski v. Commonwealth, 2 Va. App. 532, 348 S.E.2d 1 (1986).

Refusal to appoint second psychiatrist not error. – The trial court did not err in refusing to appoint a second independent private psychiatrist, where soon after defendant was formally charged, his counsel moved for the appointment of a private psychiatrist to examine and evaluate the defendant and to aid in his defense and that motion was granted. Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985) does not require the appointment of a psychiatrist of the defendant's choice. The United States Supreme Court was careful not to prescribe the method for the selection of the independent psychiatrist. Beaver v. Commonwealth, 232 Va. 521, 352 S.E.2d 342, cert. denied, 483 U.S. 1033, 107 S. Ct. 3277, 97 L. Ed. 2d 781 (1987).

Plea of guilty by insane defendant. – A man whose mind is so crippled by psychosis that he cannot understand the proceedings or confer intelligently about the case is in no position to plead guilty or to consent to such a plea in his behalf. If a trial court accepts a plea of guilty from such a man, the resulting judgment is vulnerable to collateral attack. Thomas v. Cunningham, 313 F.2d 934 (4th Cir. 1963).

§ 19.2-168. Notice to Commonwealth of intention to present evidence of insanity; continuance if notice not given. – In any case in which a person charged with a crime intends (i) to put in issue his sanity at the time of the crime charged and (ii) to present testimony of an expert to support his claim on this issue at his trial, he, or his counsel, shall give notice in writing to the attorney for the Commonwealth, at least twenty-one days prior to his trial, of his intention to present such evidence. In the event that such notice is not given, and the person proffers such evidence at his trial as a defense, then the court may in its discretion, either allow the Commonwealth a continuance or, under appropriate circumstances, bar the defendant from presenting such evidence. The period of any such continuance shall not be counted for speedy trial purposes under § 19.2-243. (Code 1950, § 19.1-227.1; 1970, c. 336; 1975, c. 495; 1986, c. 535.)

Law Review. – For survey of Virginia law on criminal law and procedure for the year 1969-1970, see 56 Va. L. Rev. 1572 (1970). For comment on the insanity defense in Virginia, see 17 U. Rich. L. Rev. 129 (1982). For article, "Virginia's Capital Murder Sentencing Proceeding: A Defense Perspective," see 18 U. Rich. L. Rev. 341 (1984).

Commonwealth entitled to other sanity evaluations. – Subsection E of § 19.2-169.5 clearly provides that the Commonwealth is entitled not only to the report ordered under § 19.2-169.5, but also to the results of any other evaluation of the defendant's sanity when notice is given by the defense pursuant to this section; subsection E of § 19.2-169.5 cannot be

read as applying only to the report ordered. Blevins v. Commonwealth, 11 Va. App. 429, 399 S.E.2d 173 (1990).

Applied in Shifflett v. Commonwealth, 221 Va. 760, 274 S.E.2d 305 (1981).

§ 19.2-168.1. Evaluation on motion of the Commonwealth after notice. — A. If the attorney for the defendant gives notice pursuant to § 19.2-168, and the Commonwealth thereafter seeks an evaluation of the defendant's sanity at the time of the offense, the court shall appoint one or more qualified mental health experts to perform such an evaluation. The court shall order the defendant to submit to such an evaluation and advise the defendant on the record in court that a refusal to cooperate with the Commonwealth's expert could result in exclusion of the defendant's expert evidence. The qualification of the experts shall be governed by subsection A of § 19.2-169.5. The location of the evaluation shall be governed by subsection B of § 19.2-169.5. The attorney for the Commonwealth shall be responsible for providing the experts the information specified in subsection C of § 19.2-169.5. After performing their evaluation, the experts shall report their findings and opinions, and provide copies of psychiatric, psychological, medical or other records obtained during the course of the evaluation to the attorneys for the Commonwealth and the defense.

B. If the court finds, after hearing evidence presented by the parties, that the defendant has refused to cooperate with an evaluation requested by the Commonwealth, it may admit evidence of such refusal or, in the discretion of the court, bar the defendant from presenting expert psychiatric or psychological evidence at trial on the issue of his sanity at the time of the offense. (1982, c. 653; 1986, c. 535.)

Law Review. — For comment suggesting the need for reform of the insanity defense in Virginia, see 13 U. Rich. L. Rev. 397 (1979). For review of Fourth Circuit cases on criminal procedure, see 36 Wash. & Lee L. Rev. 485 (1979). For survey of Virginia law on criminal procedure for the year 1978-1979, see 66 Va. L. Rev. 261 (1980). For article, "The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation," see 66 Va. L. Rev. 427 (1980). For comment on the insanity defense in Virginia, see 17 U. Rich. L. Rev. 129 (1982).

There exists no constitutional right to the appointment of a private psychiatrist of the defendant's own choosing at public expense. Satterfield v. Zahradnick, 572 F.2d 443 (4th Cir.), cert. denied, 436 U.S. 920, 98 S. Ct. 2270, 56 L. Ed. 2d 762 (1978), decided under repealed § 19.2-169.

Liability for expenses where hospitalized under Title 37.1. — A person is liable for the expenses of his care, treatment, and maintenance when confined to a state hospital pursuant to Title 37.1, even though he previously had been confined to the facility pursuant to former § 19.2-169 as a person charged with crime. Commonwealth, Dep't of Mental Health & Mental Retardation v. Jenkins, 224 Va. 456, 297 S.E.2d 692 (1982).

§ 19.2-169: Repealed by Acts 1982, c. 653

Cross references. — For present provisions covering the subject matter of the repealed section, see §§ 19.2-168.1 and 19.2-169.1.

§ 19.2-169.1. Raising question of competency to stand trial or plead; evaluation and determination of competency. — A. *Raising competency issue; appointment of evaluators.* — If, at any time after the attorney for the defendant has been retained or appointed and before the end of trial, the court finds, upon hearing evidence or representations of counsel for the defendant or the attorney for the Commonwealth, that there is probable cause to believe that the defendant lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense, the court shall order that a competency evaluation be performed by at least one psychiatrist, clinical

psychologist or master's level psychologist who is qualified by training and experience in forensic evaluation.

B. *Location of evaluation.* — The evaluation shall be performed on an outpatient basis at a mental health facility or in jail unless the court specifically finds that outpatient evaluation services are unavailable or unless the results of outpatient evaluation indicate that hospitalization of the defendant for evaluation on competency is necessary. If either finding is made, the court, under authority of this subsection, may order the defendant sent to a hospital designated by the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services as appropriate for evaluations of persons under criminal charge. The defendant shall be hospitalized for such time as the director of the hospital deems necessary to perform an adequate evaluation of the defendant's competency, but not to exceed thirty days from the date of admission to the hospital.

C. *Provision of information to evaluators.* — The court shall require the attorney for the Commonwealth to provide to the evaluators appointed under subsection A any information relevant to the evaluation, including, but not limited to (i) a copy of the warrant or indictment; (ii) the names and addresses of the attorney for the Commonwealth, the attorney for the defendant, and the judge ordering the evaluation; (iii) information about the alleged crime; and (iv) a summary of the reasons for the evaluation request. The court shall require the attorney for the defendant to provide any available psychiatric records and other information that is deemed relevant.

D. *The competency report.* — Upon completion of the evaluation, the evaluators shall promptly submit a report in writing to the court and the attorneys of record concerning (i) the defendant's capacity to understand the proceedings against him; (ii) his ability to assist his attorney; and (iii) his need for treatment in the event he is found incompetent. No statements of the defendant relating to the time period of the alleged offense shall be included in the report.

E. *The competency determination.* — After receiving the report described in subsection D, the court shall promptly determine whether the defendant is competent to stand trial. A hearing on the defendant's competency is not required unless one is requested by the attorney for the Commonwealth or the attorney for the defendant, or unless the court has reasonable cause to believe the defendant will be hospitalized under § 19.2-169.2. If a hearing is held, the party alleging that the defendant is incompetent shall bear the burden of proving by a preponderance of the evidence the defendant's incompetency. The defendant shall have the right to notice of the hearing, the right to counsel at the hearing and the right to personally participate in and introduce evidence at the hearing.

The fact that the defendant claims to be unable to remember the time period surrounding the alleged offense shall not, by itself, bar a finding of competency if the defendant otherwise understands the charges against him and can assist in his defense. Nor shall the fact that the defendant is under the influence of medication bar a finding of competency if the defendant is able to understand the charges against him and assist in his defense while medicated. (1982, c. 653; 1983, c. 373; 1985, c. 307.)

Cross references. — As to representation by counsel in proceeding for commitment, see § 19.2-182.

I. General Consideration.
II. Action by the Court.
III. Proof.
IV. Practice and Procedure.

I. GENERAL CONSIDERATION.

Editor's note. — Many of the cases cited in the following annotations were decided under repealed § 19.2-169.

As to constitutionality of procedure under former § 19.2-169, see Payne v. Slayton, 329 F. Supp. 886 (W.D. Va. 1971).

Former § 19.2-169 was enacted in clear recognition of the State's constitutional obligation to provide a hearing on the question of whether a person to be tried is in such a mental condition that his confinement in a hospital for the insane or colony for the feebleminded for proper care and observation is necessary to attain the ends of justice. Thomas v. Cunningham, 313 F.2d 934 (4th Cir. 1963).

Due process requires state to provide means to raise issue. — Due process requires that the State must provide an adequate means by which an accused can raise the issue of insanity at the time of trial and at the commission of the alleged offense. Hodnett v. Slayton, 343 F. Supp. 1142 (W.D. Va. 1972), appeal dismissed, 471 F.2d 648 (4th Cir. 1973).

Trial court's refusal to suspend proceedings as denial of due process. — Where insanity at the time of the trial was established by reliable and uncontroverted sworn medical testimony, on the strength of this prima facie showing, the trial court's refusal to suspend the proceedings and its decision to hold trial the very next morning was so arbitrary as to constitute a denial of due process. Thomas v. Cunningham, 313 F.2d 934 (4th Cir. 1963).

Procedures must be set in motion whenever bona fide doubt as to competency exists. — State hearing procedures must be set in motion whenever it appears in the course of the proceedings that a bona fide doubt as to a defendant's competency exists. McLaughlin v. Royster, 346 F. Supp. 297 (E.D. Va. 1972).

Commitment proceedings as to persons accused of crime are for their protection. Timmons v. Peyton, 240 F. Supp. 749 (E.D. Va. 1965), rev'd on other grounds, 360 F.2d 327 (4th Cir.), cert. denied, 385 U.S. 960, 87 S. Ct. 396, 17 L. Ed. 2d 305 (1966).

Failure to raise question. — The protection afforded the defendant is illusory if, when a reasonable doubt as to his sanity arises, neither court nor counsel seeks to utilize the procedures provided by the State for determining competency. Kibert v. Peyton, 383 F.2d 566 (4th Cir. 1967).

There exists no constitutional right to the appointment of a private psychiatrist of the defendant's own choosing at public expense. Satterfield v. Zahradnick, 572 F.2d 443 (4th Cir.), cert. denied, 436 U.S. 920, 98 S. Ct. 2270, 56 L. Ed. 2d 762 (1978).

No constitutional guarantee of examination. — There is no constitutional guarantee that every person indicted for a felony is entitled to a mental examination. Kerns v. Peyton, 292 F. Supp. 182 (W.D. Va. 1968); Newman v. Peyton, 303 F. Supp. 462 (W.D. Va. 1969).

A state prisoner who alleges mental incapacity to stand trial is not entitled as a matter of right to pretrial commitment and examination at state expense. Morris v. Peyton, 283 F. Supp. 63 (W.D. Va. 1968).

No obligation on court where defendant's mental health not in doubt. — Former § 19.2-169 placed no obligation upon the court or the attorney for the Commonwealth in cases where there was no reason to doubt petitioner's mental health. Newman v. Peyton, 303 F. Supp. 462 (W.D. Va. 1969). See also Kerns v. Peyton, 292 F. Supp. 182 (W.D. Va. 1968).

Former § 19.2-169 placed no obligation upon the court to appoint a committee except where the court or attorney for the Commonwealth had reason to believe that the person to be tried was in such mental condition that his confinement in a hospital for the insane or colony for the feebleminded for proper care and observation was necessary to attain the ends of justice. Wood v. Commonwealth, 146 Va. 296, 135 S.E. 895 (1926); Delp v. Commonwealth, 172 Va. 564, 200 S.E. 594 (1939); Tilton v. Commonwealth, 196 Va. 774, 85 S.E.2d 368 (1955).

State must assure indigent defendant access to competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense when the defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial. Tuggle v. Commonwealth, 230 Va. 99, 334 S.E.2d 838 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3309, 92 L. Ed. 2d 722 (1986).

Indigent entitled to psychiatrist in capital case on issue of future dangerousness. — When the prosecution in a capital sentencing proceeding presents psychiatric evidence of an indigent defendant's future dangerousness, due process requires that a state provide the defendant the assistance of a psychiatrist on the issue. Where the Commonwealth presented psychiatric evidence that defendant showed a high probability of future dangerousness, even though defendant's trial and direct appeal predated the decision of the United States Supreme Court in Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), in light of that decision the trial court erred in denying his motion for an independent psychiatrist to rebut the Commonwealth's psychiatric evidence of future dangerousness. Tuggle v. Commonwealth, 230 Va. 99, 334 S.E.2d 838 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3309, 92 L. Ed. 2d 722 (1986).

Ake v. Oklahoma to be applied prospec-

tively. — The rule announced in Ake v. Oklahoma, 105 S. Ct. 1087 (1985) (that due process of law was denied where no psychiatrist was appointed to examine the defendant, to help him prepare his case, to serve as an expert witness for the defense, and to assist in the defense at trial) should be applied only to those cases tried subsequent to Feb. 26, 1985. Snurkowski v. Commonwealth, 2 Va. App. 532, 348 S.E.2d 1 (1986).

Commitment to a hospital or other means of inquisition is not granted ex mero motu; it is not a perfunctory order. Hawks v. Peyton, 370 F.2d 123 (4th Cir. 1966), cert. denied, 387 U.S. 925, 87 S. Ct. 2044, 18 L. Ed. 2d 982 (1967). See also Kerns v. Peyton, 292 F. Supp. 182 (W.D. Va. 1968).

Applied in Washington v. Commonwealth, 228 Va. 535, 323 S.E.2d 577 (1984).

II. ACTION BY THE COURT.

Action by court is discretionary. — Under former § 19.2-169 the lower court, after hearing the evidence, could in its discretion commit a person held for trial to the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services at the proper hospital, pending determination of his mental condition. Delp v. Commonwealth, 172 Va. 564, 200 S.E. 594 (1939).

The language of former § 19.2-169 imported the exercise of discretion by the trial court in deciding whether the circumstances warranted further inquiry into defendant's mental condition, rather than the imposition of a mandate requiring such action regardless of the circumstances. Elkins v. Commonwealth, 208 Va. 336, 157 S.E.2d 243 (1967).

And will not be disturbed absent abuse. — The trial court's choice is discretionary and its denial of defendant's motion for a mental examination before trial will not be disturbed unless it is clearly shown that the trial court abused its discretion. Poteat v. Peyton, 270 F. Supp. 220 (W.D. Va. 1967).

The use of former § 19.2-169 was entirely discretionary with the trial court. The failure of the trial court to exercise such discretion was reviewable only in the event of clear abuse of judicial discretion. Morris v. Peyton, 283 F. Supp. 63 (W.D. Va. 1968).

Denial of a motion for pretrial examination cannot be assailed except for abuse of discretion. Thomas v. Cunningham, 313 F.2d 934 (4th Cir. 1963); Poteat v. Peyton, 270 F. Supp. 220 (W.D. Va. 1967); Morris v. Peyton, 283 F. Supp. 63 (W.D. Va. 1968).

The denial of a motion for a pretrial examination or the denial of a motion for a continuance in order to effectuate a mental examination cannot be assailed except for a clear abuse of discretion. Ashby v. Cox, 344 F. Supp. 759 (W.D. Va. 1972).

While the Supreme Court has the power to review the action of the trial court in committing or refusing to commit persons to the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services, it will not disturb the trial court's ruling unless it plainly appears that the discretion of the trial court has been abused. Delp v. Commonwealth, 172 Va. 564, 200 S.E. 594 (1939); Tilton v. Commonwealth, 196 Va. 774, 85 S.E.2d 368 (1955).

Denial of motion held not an abuse. — Where there was no prima facie showing of insanity that would cause the court to doubt the defendant's sanity, there was no abuse of discretion by the trial court in denying defendant's motion. Poteat v. Peyton, 270 F. Supp. 220 (W.D. Va. 1967).

A trial judge did not abuse his discretion in denying a pretrial examination under former § 19.2-169 where testimony indicated that petitioner understood the nature of the charges against him and that he was aware that he was subject to punishment for them if found guilty, where the reason for an expert witness's lack of faith in the petitioner's ability to stand trial was not his present mental condition or competence but was caused by petitioner's memory lapse occasioned by heavy drinking, where the petitioner appeared normal while in court, and the petitioner's own testimony revealed nothing which indicated any mental defect or disease at the time of trial, and where there was no evidence that the petitioner had any prior history of mental instability. South v. Slayton, 336 F. Supp. 879 (W.D. Va. 1972).

The trial court has the inherent power to require defendant to be examined by a psychiatric committee in order that his examiners might report their opinion as to his sanity at the time of his alleged crimes and testify to such opinion if called by the Commonwealth as rebuttal witnesses. Shifflett v. Commonwealth, 221 Va. 760, 274 S.E.2d 305 (1981).

Judge may invoke procedure sua sponte. — Since a defendant cannot always be expected to demand a sanity examination for himself, the judge may invoke the procedure sua sponte. Thomas v. Cunningham, 313 F.2d 934 (4th Cir. 1963).

And should do so when adequate showing has been made. — When an adequate showing has been made to raise the issue of the defendant's sanity, the trial court should order a hearing sua sponte. McLaughlin v. Royster, 346 F. Supp. 297 (E.D. Va. 1972).

III. PROOF.

An accused is presumed to be sane at the trial unless his mental condition is called into question by proof to the contrary. Payne v.

Slayton, 329 F. Supp. 886 (W.D. Va. 1971).

An accused is presumed to be sane at the trial and during the commission of the offense, and it is his burden to prove the contrary. Graham v. Gathright, 345 F. Supp. 1148 (W.D. Va. 1972).

A simple suggestion of mental deficiency is not enough to require deferment of trial. Hawks v. Peyton, 370 F.2d 123 (4th Cir. 1966), cert. denied, 387 U.S. 925, 87 S. Ct. 2044, 18 L. Ed. 2d 982 (1967).

Fact that defendant had been in a mental institution on different occasions did not make out a prima facie case of insanity where that fact was not established before the trial court. Poteat v. Peyton, 270 F. Supp. 220 (W.D. Va. 1967).

Burden on accused upon motion for pretrial commitment. — In proceeding on a motion for pretrial commitment for observation and report, an accused was not required to prove actual insanity, as is necessary where lack of criminal responsibility is asserted as an affirmative defense. His sole burden was to adduce facts sufficient to create in the court's mind reasonable grounds to doubt his sanity. Thomas v. Cunningham, 313 F.2d 934 (4th Cir. 1963); Ashby v. Cox, 344 F. Supp. 759 (W.D. Va. 1972).

In proceeding on a motion for pretrial commitment, an accused met his burden of creating a reasonable doubt as to his sanity where two specialists testified without contradiction or reservation that accused was presently in the grip of a serious psychosis, disabling him from assisting his counsel. Thomas v. Cunningham, 313 F.2d 934 (4th Cir. 1963).

In Virginia, unlike the federal practice, the burden rests upon the accused to prove his mental incompetency. Timmons v. Peyton, 240 F. Supp. 749 (E.D. Va. 1965), rev'd on other grounds, 360 F.2d 327 (4th Cir.), cert. denied, 385 U.S. 960, 87 S. Ct. 396, 17 L. Ed. 2d 305 (1966).

The duty of carrying the burden of proving a defendant's insanity at the time of trial falls upon the petitioner's attorney to present the issue to the court when he has reasonable belief that his client's mental condition is of a nature which may render him incompetent to stand trial and which may also raise a question of his client's sanity at the time of the crime. Payne v. Slayton, 329 F. Supp. 886 (W.D. Va. 1971).

The burden of proof on the issue of insanity rests with the accused. Hodnett v. Slayton, 343 F. Supp. 1142 (W.D. Va. 1972), appeal dismissed, 471 F.2d 648 (4th Cir. 1973).

Petitioner need not prove actual insanity. — In proceeding on a motion for pretrial commitment for observation and report, the petitioner is not required to prove actual insanity, but only to adduce facts sufficient to create in the court's mind reasonable grounds to doubt his sanity. Morris v. Peyton, 283 F. Supp. 63 (W.D. Va. 1968).

The question of whether or not the defendant knows right from wrong is not relevant to the question of whether he should have been afforded a pretrial mental examination. Ashby v. Cox, 344 F. Supp. 759 (W.D. Va. 1972).

Efforts to overcome presumption of sanity may be circumscribed by state. — The Supreme Court of the United States has stated that a defendant's efforts to overcome the presumption of sanity may be circumscribed by state prescriptions as to the quantum of proof and legal tests of sanity. Payne v. Slayton, 329 F. Supp. 886 (W.D. Va. 1971).

But due process requires opportunity to raise issue. — Although efforts to overcome the presumption of sanity may be circumscribed by state rules as to the quantum of proof and legal tests of insanity, due process requires that a state shall afford the accused adequate opportunity to raise the issue. Graham v. Gathright, 345 F. Supp. 1148 (W.D. Va. 1972).

Before indigent defendant is entitled to psychiatric assistance, he must make a threshold showing to the trial court that his sanity is likely to be a significant factor in his defense. Tuggle v. Commonwealth, 230 Va. 99, 334 S.E.2d 838 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3309, 92 L. Ed. 2d 722 (1986).

IV. PRACTICE AND PROCEDURE.

Proof of reasonable ground for questioning mental capacity entitles a person to a preliminary inquiry upon his mental capability to understand the nature of the charge against him and to assist in his defense. Owsley v. Peyton, 368 F.2d 1002 (4th Cir. 1966).

Hearing contemplated. — Former § 19.2-169 contemplated that the court would rule on the suggestion "after hearing evidence." Hawks v. Peyton, 370 F.2d 123 (4th Cir. 1966), cert. denied, 387 U.S. 925, 87 S. Ct. 2044, 18 L. Ed. 2d 982 (1967).

Presence of accused at hearing. — If the personal presence of the party sought to be committed is required at any hearing prescribed, it will present grave difficulties with respect to many suspected mentally ill persons accused of crime, and will, in effect, prejudice the rights of an accused, as many such persons are not in condition to appear in court. Timmons v. Peyton, 240 F. Supp. 749 (E.D. Va. 1965), rev'd on other grounds, 360 F.2d 327 (4th Cir.), cert. denied, 385 U.S. 960, 87 S. Ct. 396, 17 L. Ed. 2d 305 (1966).

Precommitment hearing does not decide issue of competency. — The precommiment hearing does not decide the issue of competency, but rather the existence of reason

to believe that the defendant may be incompetent. McLaughlin v. Royster, 346 F. Supp. 297 (E.D. Va. 1972).

Separate hearing on issue of sanity was unjustified where the court, upon the concurrence of two qualified psychologists, considered defendant mentally competent to stand trial for murder, and the jury affirmed such a conclusion. Wilson v. Cox, 312 F. Supp. 209 (W.D. Va. 1970).

The report from the hospital does not conclude the issue of competency. Counsel has a duty to explore the matter further and adduce evidence in court, when there is reason for doubt as to the mental condition of the accused. McLaughlin v. Royster, 346 F. Supp. 297 (E.D. Va. 1972).

Effective assistance of counsel. — If reasonable grounds exist for questioning the sanity or competency of a defendant and counsel fails to explore the matter, the defendant has been denied effective assistance of counsel. Wood v. Zahradnick, 430 F. Supp. 107 (E.D. Va. 1977), aff'd, 578 F.2d 980 (4th Cir. 1978).

Where the facts known or reasonably ascertainable by counsel prior to trial were sufficient to inject the issues of whether the defendant was incompetent to stand trial or whether he was not responsible for his acts in the case, counsel had an affirmative obligation to make suitable inquiry to determine whether these defenses could be advanced. Counsel's failure to do so rendered his assistance ineffective within the meaning of the sixth amendment. Wood v. Zahradnick, 430 F. Supp. 107 (E.D. Va. 1977), aff'd, 578 F.2d 980 (4th Cir. 1978).

The defense attorney's failure to explore the mental condition of his client deprived his client of his right to effective assistance of counsel where the trial was certain to result in his conviction unless an insanity defense prevailed and where the circumstances suggested such a defense. Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978).

The failure of the defendant's lawyer to explore the matter and adduce evidence in court where there was reason for doubt as to the mental condition of the accused constituted a denial of his right to effective assistance of counsel. Kibert v. Peyton, 383 F.2d 566 (4th Cir. 1967).

Defense of incompetency cannot be waived. — The defense of incompetency to stand trial cannot be waived by the incompetent, and his counsel cannot waive it for him by failing to move for examination of his competency. Kibert v. Peyton, 383 F.2d 566 (4th Cir. 1967).

The due process right to face trial only while capable of understanding and assisting in the proceedings is not subject to waiver. McLaughlin v. Royster, 346 F. Supp. 297 (E.D. Va. 1972).

Effect of evaluation request on speedy trial right. — Where record clearly indicated that the substantial delay of trial was occasioned by defendant's motion for an evaluation pursuant to this section and his conduct in relation to the evaluation, i.e., waiting almost five months to supply information necessary for the examination to commence, no denial of speedy trial occurred. Jones v. Commonwealth, 13 Va. App. 566, 414 S.E.2d 193 (1992).

Defendant may subsequently raise defense of insanity at time of offense. — Even if the trial court determines that the accused has the capacity to stand trial, he is not precluded from, and must be given the opportunity of, raising a defense of insanity at the time of the commission of the offense. Graham v. Gathright, 345 F. Supp. 1148 (W.D. Va. 1972).

On habeas corpus a federal court may, in its discretion, entertain and consider a review of the issue of insanity at the time of trial, even where the state court has previously determined the same issue after hearing. It is not, however, required to do so. Owsley v. Cunningham, 190 F. Supp. 608 (E.D. Va. 1961).

Where no hearing has ever been had in any state court proceeding on the issue of insanity at the time of trial, either at or immediately prior to the trial on the merits or by way of post-conviction remedies in the state court, it seems appropriate that a federal court should grant a plenary hearing. Owsley v. Cunningham, 190 F. Supp. 608 (E.D. Va. 1961).

While the provisions of former §§ 19.2-169 and 19.2-170 were discretionary, the failure of the trial court to exercise such discretion, while reviewable on direct appeal in the event of a clear abuse of judicial discretion, did not preclude the accused from proving his lack of mental capacity under his plea of not guilty, and the jury could find the accused not guilty by reason of insanity. The trial court, in exercising its discretion by denying the motion to commit, conducted a hearing on the reasonable necessity of such commitment for observation and report. Any error of the state court in evaluating the issue of mental competency would not go to jurisdiction; it is only the denial of the opportunity to tender the issue of insanity which affords the right to present the issue of insanity in habeas corpus proceedings. Owsley v. Cunningham, 190 F. Supp. 608 (E.D. Va. 1961).

Since due process entitled an accused to have the matter of sanity thoroughly canvassed and the Commonwealth provided the means for it, a federal court was obliged to scrutinize the procedures by which an accused's claim was rejected. Thomas v. Cunningham, 313 F.2d 934 (4th Cir. 1963).

Petition for habeas corpus on the grounds of

alleged insanity at the time of trial was entertained by a federal court even though the petitioner never took a direct appeal from his convictions. Thomas v. Cunningham, 313 F.2d 934 (4th Cir. 1963).

When the opportunity to raise the issue of the defendant's sanity has been provided, a federal court in a habeas corpus proceeding need not inquire again into the mental fitness of the state prisoner. Hodnett v. Slayton, 343 F. Supp. 1142 (W.D. Va. 1972), appeal dismissed, 471 F.2d 648 (4th Cir. 1973).

Where the issue is insanity at the time of trial, a federal court is obliged to examine the procedures by which this claim was rejected, but it is not required to review the merits of the determination where the State has done so. Graham v. Gathright, 345 F. Supp. 1148 (W.D. Va. 1972).

Under the rule governing federal habeas corpus proceedings, a federal district court cannot rely upon the state court's findings as sufficient basis to decide a defendant's claim of incompetence to stand trial where no specific finding of fact was made by the state court as to petitioner's condition when he was tried, and where the ruling against petitioner was apparently based upon a restrictive rule of the relevance of evidence, which kept the state court from deciding the central issue of competency. McLaughlin v. Royster, 346 F. Supp. 297 (E.D. Va. 1972).

On the issue of the competency of a petitioner to stand trial, he has the right to a federal hearing. McLaughlin v. Royster, 346 F. Supp. 297 (E.D. Va. 1972).

Liability for expenses where hospitalized under Title 37.1. — A person is liable for the expenses of his care, treatment, and maintenance when confined to a state hospital pursuant to Title 37.1, even though he previously had been confined to the facility pursuant to former § 19.2-169 as a person charged with crime. Commonwealth, Dep't of Mental Health & Mental Retardation v. Jenkins, 224 Va. 456, 297 S.E.2d 692 (1982).

Appointment on prior occasions did not preclude status as "independent" psychiatrist. — Doctor was not precluded from being an "independent" psychiatrist simply because he had been appointed by the court on prior occasions. Hogan v. Commonwealth, 5 Va. App. 36, 360 S.E.2d 371 (1987).

Ordering of examination not a finding of probable cause. — Where the court ordered the psychiatric examination solely because "this is a capital murder case," the court did not, merely by ordering the psychiatric examination pursuant to §§ 19.2-169.1 and 19.2-169.5, as a matter of law, find probable cause. Tuggle v. Commonwealth, 230 Va. 99, 334 S.E.2d 838 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3309, 92 L. Ed. 2d 722 (1986).

Withdrawal of notice of intent did not moot issue of error in denying motion for psychiatric assistance. — The issue of whether the court erred in denying defendant's pre-trial motion for independent psychiatric assistance was not moot, where defendant withdrew his notice of intent to rely on an insanity defense because of his belief that he had not been given sufficient opportunity to develop evidence of his mental state at the time of the offense. Hogan v. Commonwealth, 5 Va. App. 36, 360 S.E.2d 371 (1987).

Issue of whether defendant met burden not addressed on appeal where psychiatrist provided. — It is not necessary to address the issue on appeal whether defendant carried the threshold burden required in Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), where the trial court did, in fact, provide him with the services of an independent psychiatrist. Hogan v. Commonwealth, 5 Va. App. 36, 360 S.E.2d 371 (1987).

§ 19.2-169.2. Disposition when defendant found incompetent. — A. Upon finding pursuant to subsection E of § 19.2-169.1 that the defendant is incompetent, the court shall order that the defendant receive treatment to restore his competency on an outpatient basis or, if the court specifically finds that the defendant requires inpatient hospital treatment, at a hospital designated by the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services as appropriate for treatment of persons under criminal charge. Any reports submitted pursuant to subsection D of § 19.2-169.1 shall be made available to the director of the treating facility.

B. If, at any time after the defendant is ordered to undergo treatment under subsection A of this section, the director of the treatment facility believes the defendant's competency is restored, the director shall immediately send a report to the court as prescribed in subsection D of § 19.2-169.1. The court shall make a ruling on the defendant's competency according to the procedures specified in subsection E of § 19.2-169.1. (1982, c. 653.)

§ 19.2-169.3. Disposition of the unrestorable incompetent defendant. — A. If, at any time after the defendant is ordered to undergo treatment pursuant to subsection A of § 19.2-169.2, the director of the treating facility concludes that the defendant is likely to remain incompetent for the foreseeable future, he shall send a report to the court so stating. The report shall also indicate whether, in the director's opinion, the defendant should be released, committed pursuant to § 37.1-67.3, or certified pursuant to § 37.1-65.1 in the event he is found to be unrestorably incompetent. Upon receipt of the report, the court shall make a competency determination according to the procedures specified in subsection E of § 19.2-169.1. If the court finds that the defendant is incompetent and is likely to remain so for the foreseeable future, it shall order that he be (i) released, (ii) committed pursuant to § 37.1-67.3, or (iii) certified pursuant to § 37.1-65.1. If the court finds the defendant incompetent but restorable to competency in the foreseeable future, it may order treatment continued until six months have elapsed from the date of the defendant's initial admission under subsection A of § 19.2-169.2.

B. At the end of six months from the date of the defendant's initial admission under subsection A of § 19.2-169.2 if the defendant remains incompetent in the opinion of the director, the director shall so notify the court and make recommendations concerning disposition of the defendant as described above. The court shall hold a hearing according to the procedures specified in subsection E of § 19.2-169.1 and, if it finds the defendant unrestorably incompetent, shall order one of the dispositions described above. If the court finds the defendant incompetent but restorable to competency, it may order continued treatment under subsection A of § 19.2-169.2 for additional six-month periods, provided a hearing pursuant to subsection E of § 19.2-169.1 is held at the completion of each such period and the defendant continues to be incompetent but restorable to competency in the foreseeable future.

C. If not dismissed without prejudice at an earlier time, charges against an unrestorable incompetent defendant shall be dismissed on the date upon which his sentence would have expired had he been convicted and received the maximum sentence for the crime charged, or on the date five years from the date of his arrest for such charges, whichever is sooner. (1982, c. 653.)

Liability for expenses when hospitalized under Title 37.1. — A person is liable for the expenses of his care, treatment, and maintenance when confined to a state hospital pursuant to Title 37.1, even though he previously had been confined to the facility pursuant to former § 19.2-169 as a person charged with crime. Commonwealth, Dep't of Mental Health & Mental Retardation v. Jenkins, 224 Va. 456, 297 S.E.2d 692 (1982).

§ 19.2-169.4. Litigating certain issues when the defendant is incompetent. — A finding of incompetency does not preclude the adjudication, at any time before trial, of a motion objecting to the sufficiency of the indictment, nor does it preclude the adjudication of similar legal objections which, in the court's opinion, may be undertaken without the personal participation of the defendant. (1982, c. 653.)

§ 19.2-169.5. Evaluation of sanity at the time of the offense; disclosure of evaluation results. — A. *Raising issue of sanity at the time of offense; appointment of evaluators.* — If, at any time before trial, the court finds, upon hearing evidence or representations of counsel for the defendant, that there is probable cause to believe that the defendant's sanity will be a significant factor in his defense and that the defendant is financially unable to pay for expert assistance, the court shall appoint one or more qualified mental health experts to evaluate the defendant's sanity at the time of the offense and,

where appropriate, to assist in the development of an insanity defense. Such mental health expert shall be (i) a psychiatrist, a clinical psychologist, or an individual with a doctorate degree in clinical psychology who has successfully completed forensic evaluation training as approved by the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services and (ii) qualified by specialized training and experience to perform forensic evaluations. The defendant shall not be entitled to a mental health expert of his own choosing or to funds to employ such expert.

B. *Location of evaluation.* — The evaluation shall be performed on an outpatient basis, at a mental health facility or in jail, unless the court specifically finds that outpatient services are unavailable, or unless the results of the outpatient evaluation indicate that hospitalization of the defendant for further evaluation of his sanity at the time of the offense is necessary. If either finding is made, the court, under authority of this subsection, may order that the defendant be sent to a hospital designated by the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services as appropriate for evaluation of the defendant under criminal charge. The defendant shall be hospitalized for such time as the director of the hospital deems necessary to perform an adequate evaluation of the defendant's sanity at the time of the offense, but not to exceed thirty days from the date of admission to the hospital.

C. *Provision of information to evaluator.* — The court shall require the party making the motion for the evaluation, and such other parties as the court deems appropriate, to provide to the evaluators appointed under subsection A any information relevant to the evaluation, including, but not limited to (i) copy of the warrant or indictment; (ii) the names and addresses of the attorney for the Commonwealth, the attorney for the defendant and the judge who appointed the expert; (iii) information pertaining to the alleged crime, including statements by the defendant made to the police and transcripts of preliminary hearings, if any; (iv) a summary of the reasons for the evaluation request; (v) any available psychiatric, psychological, medical or social records that are deemed relevant; and (vi) a copy of the defendant's criminal record, to the extent reasonably available.

D. The evaluators shall prepare a full report concerning the defendant's sanity at the time of the offense, including whether he may have had a significant mental disease or defect which rendered him insane at the time of the offense. The report shall be prepared within the time period designated by the court, said period to include the time necessary to obtain and evaluate the information specified in subsection C.

E. *Disclosure of evaluation results.* — The report described in subsection D shall be sent solely to the attorney for the defendant and shall be deemed to be protected by the lawyer-client privilege. However, the Commonwealth shall be given the report, the results of any other evaluation of the defendant's sanity at the time of the offense, and copies of psychiatric, psychological, medical, or other records obtained during the course of any such evaluation, after the attorney for the defendant gives notice of an intent to present psychiatric or psychological evidence pursuant to § 19.2-168. (1982, c. 653; 1986, c. 535; 1987, c. 439; 1996, cc. 937, 980.)

Editor's note. — Many of the cases cited in the following annotations were decided under repealed §§ 19.2-169 and 19.2-170.

The 1996 amendments. — The 1996 amendments by cc. 937 and 980 are identical, and in subsection A, in clause (i), deleted "licensed" preceding "psychologist" and deleted "a licensed psychologist registered with the Board of Psychology with a specialty in clinical services" preceding "or an individual with a doctorate degree."

Law Review. — For comment on the insanity defense in Virginia, see 17 U. Rich. L. Rev. 129 (1982).

Due process requires that State must provide adequate means by which accused can raise issue of insanity at the time of trial and at the commission of the alleged

offense. Hodnett v. Slayton, 343 F. Supp. 1142 (W.D. Va. 1972), appeal dismissed, 471 F.2d 648 (4th Cir. 1973).

State must assure indigent defendant access to competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense when the defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial. Tuggle v. Commonwealth, 230 Va. 99, 334 S.E.2d 838 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3309, 92 L. Ed. 2d 722 (1986).

Indigent entitled to psychiatrist in capital case on issue of future dangerousness. — When the prosecution in a capital sentencing proceeding presents psychiatric evidence of an indigent defendant's future dangerousness, due process requires that a state provide the defendant the assistance of a psychiatrist on the issue. Where the Commonwealth presented psychiatric evidence that defendant showed high probability of future dangerousness, even though defendant's trial and direct appeal predated in light of the trial court erred in denying his motion for an independent psychiatrist to rebut the Commonwealth's psychiatric evidence of future dangerousness. Tuggle v. Commonwealth, 230 Va. 99, 334 S.E.2d 838 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3309, 92 L. Ed. 2d 722 (1986).

Ake v. Oklahoma to be applied prospectively. — The rule announced in Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985) (that due process of law was denied where no psychiatrist was appointed to examine the defendant, to help him prepare his case, to serve as an expert witness for the defense, and to assist in the defense at trial) should be applied only to those cases tried subsequent to Feb. 26, 1985. Snurkowski v. Commonwealth, 2 Va. App. 532, 348 S.E.2d 1 (1986).

Examination by staff clinical psychologist and mental health professionals satisfied requirements. — The trial court correctly ruled that the examination and evaluation of defendant by a staff clinical psychologist and the mental health professionals at Central State Hospital satisfied the requirements of both subsection A and the due process requirements defined in Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). Funk v. Commonwealth, 8 Va. App. 91, 379 S.E.2d 371 (1989).

Before indigent defendant is entitled to psychiatric assistance, he must make a threshold showing to the trial court that this sanity is likely to be a significant factor in his defense. Tuggle v. Commonwealth, 230 Va. 99, 334 S.E.2d 838 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3309, 92 L. Ed. 2d 722 (1986).

Right of defendant to raise defense of insanity at time of offense despite competency finding. — Even if the trial court determines that the accused has the capacity to stand trial, he is not precluded from, and must be given the opportunity of, raising a defense of insanity at the time of the commission of the offense. Graham v. Gathright, 345 F. Supp. 1148 (W.D. Va. 1972).

The trial court has the inherent power to require defendant to be examined by a psychiatric committee in order that his examiners might report their opinion as to his sanity at the time of his alleged crimes and testify to such opinion if called by the Commonwealth as rebuttal witnesses. Shifflett v. Commonwealth, 221 Va. 760, 274 S.E.2d 305 (1981).

Commonwealth entitled to other sanity evaluations. — Subsection E of this section clearly provides that the Commonwealth is entitled not only to the report ordered under this section, but also to the results of any other evaluation of the defendant's sanity when notice is given by the defense pursuant to § 19.2-168; subsection E of this section cannot be read as applying only to the report ordered. Blevins v. Commonwealth, 11 Va. App. 429, 399 S.E.2d 173 (1990).

Inquiry into competency to stand trial not limited. — Neither former § 19.2-169 nor former § 19.2-170, though preceded by § 19.2-168 requiring notice of an insanity defense, contained any language expressly or impliedly limiting the committee's (now evaluators') inquiry to competency to stand trial, or forbidding it to go into the question of insanity at the time of the alleged offense. Shifflett v. Commonwealth, 221 Va. 760, 274 S.E.2d 305 (1981).

Burden of proving insanity. — An accused is presumed to be sane at the trial and during the commission of the offense, and it is his burden to prove the contrary. Graham v. Gathright, 345 F. Supp. 1148 (W.D. Va. 1972).

The duty of carrying the burden of proving a defendant's insanity at the time of trial falls upon the petitioner's attorney to present the issue to the court when he has reasonable belief that his client's mental condition is of a nature which may render him incompetent to stand trial and which may also raise a question of his client's sanity at the time of the crime. Payne v. Slayton, 329 F. Supp. 886 (W.D. Va. 1971).

The burden of proof on the issue of insanity rests with the accused. Hodnett v. Slayton, 343 F. Supp. 1142 (W.D. Va. 1972), appeal dismissed, 471 F.2d 648 (4th Cir. 1973).

In Virginia, unlike the federal practice, the burden rests upon the accused to prove his mental incompetency. Timmons v. Peyton, 240 F. Supp. 749 (E.D. Va. 1965), rev'd on other grounds, 360 F.2d 327 (4th Cir.), cert. denied, 385 U.S. 960, 87 S. Ct. 396, 17 L. Ed. 2d 305 (1966).

Ordering of examination not a finding of

probable cause. — Where the court ordered the psychiatric examination solely because "this is a capital murder case," the court did not, merely by ordering the psychiatric examination pursuant to § 19.2-169.1 and this section, as a matter of law, find probable cause. Tuggle v. Commonwealth, 230 Va. 99, 334 S.E.2d 838 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3309, 92 L. Ed. 2d 722 (1986).

Effective assistance of counsel. — If reasonable grounds exist for questioning the sanity or competency of a defendant and counsel fails to explore the matter, the defendant has been denied effective assistance of counsel. Wood v. Zahradnick, 430 F. Supp. 107 (E.D. Va. 1977), aff'd, 578 F.2d 980 (4th Cir. 1978).

Where the facts known or reasonably ascertainable by counsel prior to trial were sufficient to inject the issues of whether the defendant was incompetent to stand trial or whether he was not responsible for his acts in the case, counsel had an affirmative obligation to make suitable inquiry to determine whether these defenses could be advanced. Counsel's failure to do so rendered his assistance ineffective within the meaning of the sixth amendment. Wood v. Zahradnick, 430 F. Supp. 107 (E.D. Va. 1977), aff'd, 578 F.2d 980 (4th Cir. 1978).

The defense attorney's failure to explore the mental condition of his client deprived his client of his right to effective assistance of counsel where the trial was certain to result in his conviction unless an insanity defense prevailed and where the circumstances suggested such a defense. Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978).

Consideration of insanity in federal habeas proceedings. — While the provisions of former §§ 19.2-169 and 19.2-170 were discretionary, the failure of the trial court to exercise such discretion, while reviewable on direct appeal in the event of a clear abuse of judicial discretion, did not preclude the accused from proving his lack of mental capacity under his plea of not guilty, and the jury could find the accused not guilty by reason of insanity. The trial court, in exercising its discretion by denying the motion to commit, conducted a hearing on the reasonable necessity of such commitment for observation and report. Any error of the state court in evaluating the issue of mental competency would not go to jurisdiction; it is only the denial of the opportunity to tender the issue of insanity which affords the right to present the issue of insanity in habeas corpus proceedings. Owsley v. Cunningham, 190 F. Supp. 608 (E.D. Va. 1961).

§ 19.2-169.6. Emergency treatment prior to trial. — A. Any defendant who is not subject to the provisions of § 19.2-169.2 may be hospitalized for psychiatric treatment prior to trial if:

1. The court with jurisdiction over the defendant's case finds clear and convincing evidence that the defendant (i) is being properly detained in jail prior to trial; (ii) is mentally ill and imminently dangerous to self or others in the opinion of a qualified mental health professional; and (iii) requires treatment in a hospital rather than the jail in the opinion of a qualified mental health professional; or

2. The person having custody over a defendant who is awaiting trial has reasonable cause to believe that (i) the defendant is mentally ill and imminently dangerous to himself or others and (ii) requires treatment in a hospital rather than jail and the person having such custody arranges for an evaluation of the defendant by a person skilled in the diagnosis and treatment of mental illness provided a judge, as defined in § 37.1-1 or, if a judge is not available, a magistrate, upon the advice of a person skilled in the diagnosis and treatment of mental illness, subsequently issues a temporary order of detention for treatment in accordance with the procedures specified in § 37.1-67.1. In no event shall the defendant have the right to make application for voluntary admission and treatment as may be otherwise provided in § 37.1-65 or § 37.1-67.3.

If the defendant is committed pursuant to subdivision 1 of this subsection, the attorney for the defendant shall be notified that the court is considering hospitalizing the defendant for psychiatric treatment and shall have the opportunity to challenge the findings of the qualified mental health professional. If the defendant is detained pursuant to subdivision 2 of this subsection, the court having jurisdiction over the defendant's case and the attorney for the defendant shall be given notice prior to the detention pursuant to a temporary order of detention or as soon thereafter as is reasonable. Upon

detention pursuant to subdivision 2 of this subsection, a hearing shall be held, upon notice to the attorney for the defendant, either (i) before the court having jurisdiction over the defendant's case or (ii) before a judge as defined in § 37.1-1, in accordance with the provisions of § 37.1-67.4, in which case the defendant shall be represented by counsel as specified in § 37.1-67.3; the hearing shall be held within forty-eight hours of execution of the temporary order to allow the court which hears the case to make the findings, based upon clear and convincing evidence, which are specified in subdivision 1 of this subsection. If the forty-eight-hour period herein specified terminates on a Saturday, Sunday or legal holiday, such person may be detained for the same period allowed for detention pursuant to an order for temporary detention issued pursuant to § 37.1-67.1.

In any case in which the defendant is hospitalized pursuant to this section, the court having jurisdiction over the defendant's case may provide by order that the admitting hospital evaluate the defendant's competency to stand trial and his mental state at the time of the offense pursuant to §§ 19.2-169.1 and 19.2-169.5.

B. A defendant subject to this section shall be treated at a hospital designated by the Commissioner as appropriate for treatment and evaluation of persons under criminal charge. The director of the hospital shall, within thirty days of the defendant's admission, send a report to the court with jurisdiction over the defendant addressing the defendant's continued need for treatment as mentally ill and imminently dangerous to self or others and, if so ordered by the court, the defendant's competency to stand trial, pursuant to subsection D of § 19.2-169.1, and his mental state at the time of the offense, pursuant to subsection D of § 19.2-169.5. Based on this report, the court shall either (i) find the defendant incompetent to stand trial pursuant to subsection E of § 19.2-169.1 and proceed accordingly, (ii) order that the defendant be discharged from custody pending trial, (iii) order that the defendant be returned to jail pending trial, or (iv) make other appropriate disposition, including dismissal of charges and release of the defendant.

C. A defendant may not be hospitalized longer than thirty days under this section unless the court which has criminal jurisdiction over him or a judge as defined in § 37.1-1 holds a hearing at which the defendant shall be represented by an attorney and finds clear and convincing evidence that the defendant continues to be (i) mentally ill, (ii) imminently dangerous to self or others, and (iii) in need of psychiatric treatment in a hospital. Hospitalization may be extended in this manner for periods of sixty days, but in no event may such hospitalization be continued beyond trial, nor shall such hospitalization act to delay trial, so long as the defendant remains competent to stand trial. (1982, c. 653; 1986, c. 629; 1987, c. 96; 1990, c. 76; 1995, c. 844.)

The 1995 amendment substituted "§ 37.1-65 or § 37.1-67.3" for "§ 37.1-67.2 or § 37.1-65" at the end of subdivision A 2.

§ 19.2-169.7. Disclosure by defendant during evaluation or treatment; use at guilt phase of trial. — No statement or disclosure by the defendant concerning the alleged offense made during a competency evaluation ordered pursuant to § 19.2-169.1, a mental state at the time of the offense evaluation ordered pursuant to § 19.2-169.5, or treatment ordered pursuant to § 19.2-169.2 or § 19.2-169.6 may be used against the defendant at trial as evidence or as a basis for such evidence, except on the issue of his mental condition at the time of the offense after he raises the issue pursuant to § 19.2-168. (1982, c. 653.)

§§ 19.2-170 through 19.2-174l Repealed by Acts 1982, c. 653

Cross references. – For present provisions covering the subject matter of the repealed sections, see §§ 19.2-168.1 and 19.2-169.1 through 19.2-169.7.

§ 19.2-174.1. Information required prior to admission to a mental health facility. – Prior to any person being placed into the custody of the Commissioner for evaluation or treatment pursuant to §§ 19.2-169.2, 19.2-169.6, 19.2-176, 19.2-177.1, 19.2-182.2, and 19.2-182.3, the court or special justice shall provide the Commissioner with the following, if available: (i) the commitment order, (ii) the names and addresses for the attorney for the Commonwealth, the attorney for the person and the judge holding jurisdiction over the person, (iii) a copy of the warrant or indictment, and (iv) a copy of the criminal incident information as defined in § 2.1-341 or a copy of the arrest report or a summary of the facts relating to the crime. The party requesting the placement into the Commissioner's custody or, in the case of admissions pursuant to §§ 19.2-169.6, 19.2-176, and 19.2-177.1, the person having custody over the defendant shall gather the above information for submission to the court at the hearing. If the information is not available at the hearing, it shall be provided by the party requesting placement or the person having custody directly to the Commissioner within ninety-six hours of the person being placed into the Commissioner's custody. (1995, c. 645.)

§ 19.2-175. Compensation of experts. – Each psychiatrist, clinical psychologist or other expert appointed by the court to render professional service pursuant to §§ 19.2-168.1, 19.2-169.1, 19.2-169.5, subsection A of § 19.2-176, §§ 19.2-182.8, 19.2-182.9, 19.2-264.3:1, or § 19.2-301, who is not regularly employed by the Commonwealth of Virginia except by the University of Virginia School of Medicine and the Medical College of Virginia, shall receive a reasonable fee for such service. The fee shall be determined in each instance by the court that appointed the expert, in accordance with guidelines established by the Supreme Court after consultation with the Department of Mental Health, Mental Retardation and Substance Abuse Services. Except in capital murder cases the fee shall not exceed $400, but in addition if any such expert is required to appear as a witness in any hearing held pursuant to such sections, he shall receive mileage and a fee of $100 for each day during which he is required so to serve. An itemized account of expense, duly sworn to, must be presented to the court, and when allowed shall be certified to the Supreme Court for payment out of the state treasury, and be charged against the appropriations made to pay criminal charges. Allowance for the fee and for the per diem authorized shall also be made by order of the court, duly certified to the Supreme Court for payment out of the appropriation to pay criminal charges. (Code 1950, § 19.1-233; 1960, c. 366; 1968, c. 657; 1970, c. 640; 1975, c. 495; 1976, c. 140; 1978, cc. 195, 794; 1979, c. 516; 1982, c. 653; 1986, c. 535; 1990, c. 697; 1995, c. 645.)

The 1995 amendment, in the first sentence, inserted "§§ 19.2-182.8, 19.2-182.9, 19.2-264.3:1, or" following "§ 19.2-176" and deleted "subsections (1) and (2) of § 19.2-181 or § 19.2-264.3:1" following "§ 19.2-301."

Law Review. – For comment on the insanity defense in Virginia, see 17 U. Rich. L. Rev. 129 (1982).

§ 19.2-176. Determination of insanity after conviction but before sentence; hearing. – A. If, after conviction and before sentence of any person, the judge presiding at the trial finds reasonable ground to question such person's mental state, he may order an evaluation of such person's mental state by at least one psychiatrist or clinical psychologist who is qualified by

training and experience to perform such evaluations. If the judge, based on the evaluation, and after hearing representations of the defendant's counsel, finds clear and convincing evidence that the defendant (i) is mentally ill, and (ii) requires treatment in a mental hospital rather than the jail, he may order the defendant hospitalized in a facility designated by the Commissioner as appropriate for treatment of persons convicted of crime. The time such person is confined to such hospital shall be deducted from any term for which he may be sentenced to any penal institution, reformatory or elsewhere.

B. If it appears from all evidence readily available that the defendant is mentally ill and poses an imminent danger to himself or others if not immediately hospitalized, a temporary order of detention may be issued in accordance with subdivision A 2 of § 19.2-169.6 and a hearing shall be conducted in accordance with subsections A and C within forty-eight hours of execution of the temporary order of detention, or if the forty-eight-hour period herein specified terminates on a Saturday, Sunday or legal holiday, such person may be detained for the same period allowed for detention pursuant to an order for temporary detention issued pursuant to § 37.1-67.1.

C. A defendant may not be hospitalized longer than thirty days under this section unless the court which has criminal jurisdiction over him, or a court designated by such court, holds a hearing, at which the defendant shall be represented by an attorney, and finds clear and convincing evidence that the defendant continues to be (i) mentally ill, (ii) imminently dangerous to self or others, and (iii) in need of psychiatric treatment in a hospital. Hospitalization may be extended in this manner for periods of 180 days, but in no event may such hospitalization be continued beyond the date upon which his sentence would have expired had he received the maximum sentence for the crime charged. (Code 1950, § 19.1-234; 1960, c. 366; 1964, c. 231; 1966, c. 715; 1972, c. 295; 1975, c. 495; 1982, c. 653; 1986, c. 629; 1990, c. 76.)

Court must have some evidence available after verdict to authorize this procedure. — After the verdict of the jury has been rendered, when nothing has transpired since the trial which could cause the court to have any reasonable doubt as to his sanity, or authorize it to proceed under this section, the court will not impanel another jury to determine the sanity of the accused, since that question had been directly put in issue under the plea of not guilty, and finding him guilty they necessarily found him to have been sane when the offense was committed. Stover v. Commonwealth, 92 Va. 780, 22 S.E. 874 (1895).

§ 19.2-177: Repealed by Acts 1988, cc. 787, 873.

Cross references. — As to determination of mental illness after sentencing, see now § 19.2-177.1.

§ 19.2-177.1. Determination of mental illness after sentencing; hearing. — A person convicted of a crime who is in the custody of a local correctional facility after sentencing may be the subject of a mental commitment proceeding in accordance with the procedures provided in Chapter 2 (§ 37.1-63 et seq.) of Title 37.1. Such proceeding shall be commenced upon petition of the person having custody over the prisoner. If the person having custody over the prisoner has reasonable cause to believe that (i) the prisoner is mentally ill and imminently dangerous to himself or others and (ii) requires treatment in a hospital rather than a local correctional facility and the person having such custody arranges for an evaluation of the prisoner by a person skilled in the diagnosis and treatment of mental illness, then a judge, as defined in § 37.1-1 or, if a judge is not available, a magistrate, upon the advice of a person skilled in the diagnosis and treatment of mental illness, may issue

a temporary order of detention for treatment in accordance with the procedures specified in subdivision A 2 of § 19.2-169.6.

In all other respects, the involuntary civil detention and commitment procedures specified in Chapter 2 of Title 37.1 shall be applicable, except:

1. Any detention or commitment shall be only to a facility designated for this purpose by the Commissioner;

2. In no event shall the prisoner have the right to make application for voluntary admission and treatment as may be otherwise provided in § 37.1-65 or § 37.1-67.3;

3. The time that such prisoner is confined to a hospital shall be deducted from any term for which he may be sentenced, but in no event may such hospitalization be continued beyond the date upon which his sentence would have expired;

4. Any prisoner hospitalized pursuant to this section who has not completed service of his sentence upon discharge from the hospital shall serve the remainder of his sentence. (1988, c. 787; 1995, c. 844.)

The 1995 amendment substituted "§ 37.1-65 or § 37.1-67.3" for "§ 37.1-67.2 or § 37.1-65" at the end of subdivision 2.

Editor's note. — The cases cited below were decided under former § 19.2-177 or prior law.

Section provides safeguard. — Virginia throws a safeguard around the execution of the death sentence under this section. Timmons v. Peyton, 240 F. Supp. 749 (E.D. Va. 1965), rev'd on other grounds, 360 F.2d 327 (4th Cir.), cert. denied, 385 U.S. 960, 87 S. Ct. 396, 17 L. Ed. 2d 305 (1966).

Prisoner sentenced to death. — This section provides an opportunity for a prisoner who after conviction and sentence to death is so deficient in his faculties that it would be a denial of due process to execute him to raise such question. Snider v. Cunningham, 292 F.2d 683 (4th Cir. 1961).

Applied in Spruill v. Commonwealth, 221 Va. 475, 271 S.E.2d 419 (1980).

§ 19.2-178. Where prisoner kept when no vacancy in facility or hospital. — When a court shall have entered any of the orders provided for in §§ 19.2-168.1, 19.2-169.1, 19.2-169.5, 19.2-169.6, 19.2-176, or § 19.2-177.1, the sheriff of the county or city or the proper officer of the penal institution shall immediately proceed to ascertain whether a vacancy exists at the proper facility or hospital and until it is ascertained that there is a vacancy such person shall be kept in the jail of such county or city or in such custody as the court may order, or in the penal institution in which he is confined, until there is room in such facility or hospital. Any person whose care and custody is herein provided for shall be taken to and from the facility or hospital to which he was committed by an officer of the penal institution having custody of him, or by the sheriff of the county or city whose court issued the order of commitment, and the expenses incurred in such removals shall be paid by such penal institution, county or city. (Code 1950, § 19.1-236; 1960, c. 366; 1975, c. 495; 1995, c. 645.)

The 1995 amendment, in the first sentence, substituted "§§ 19.2-168.1, 19.2-169.1, 19.2-169.5, 19.2-169.6, 19.2-177.1 or" for "§§ 19.2-169, 19.2-170, 19.2-173" and deleted "or § 19.2-177" following "§ 19.2-176."

§ 19.2-179: Repealed by Acts 1981, c. 310.

§ 19.2-180. Sentence or trial of prisoner when restored to sanity. — When a prisoner whose trial or sentence was suspended by reason of his being found to be insane or feebleminded, has been found to be mentally competent and is brought from a hospital and committed to jail, if already convicted, he shall be sentenced, and if not, the court shall proceed to try him as if no delay

had occurred on account of his insanity or feeblemindedness. (Code 1950, § 19.1-238; 1960, c. 366; 1975, c. 495.)

§ 19.2-181: Repealed by Acts 1991, c. 427.

Cross references. — For provisions pertaining to disposition of persons acquitted by reason of insanity, see Chapter 11.1 (§ 19.2-182.2 et seq.).

§ 19.2-182. Representation by counsel in proceeding for commitment. — A. In any proceeding for commitment under this title, the judge before whom or upon whose order the proceeding is being held, shall ascertain if the person whose commitment is sought is represented by counsel. If the person is not represented by counsel, the judge shall appoint an attorney at law to represent him in the proceeding. The attorney shall receive a fee of twenty-five dollars for his services, to be paid by the Commonwealth.

B. Any attorney representing any person in any proceeding for commitment under this title shall, prior to such proceeding, personally consult with such person. (Code 1950, § 19.1-239.1; 1966, c. 715; 1975, c. 495; 1991, c. 427.)

§ 19.2-182.1: Repealed by Acts 1982, c. 653.

CHAPTER 11.1.

Disposition of Persons Acquitted by Reason of Insanity.

§ 19.2-182.2. Verdict of acquittal by reason of insanity to state the fact; temporary custody and evaluation. — When the defense is insanity of the defendant at the time the offense was committed, the jurors shall be instructed, if they acquit him on that ground, to state the fact with their verdict. The court shall place the person so acquitted ("the acquittee") in temporary custody of the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to in this chapter as the "Commissioner") for evaluation as to whether the acquittee may be released with or without conditions or requires commitment. The evaluation shall be conducted by (i) one psychiatrist and (ii) one clinical psychologist. The psychiatrist or clinical psychologist shall be skilled in the diagnosis of mental illness and mental retardation and qualified by training and experience to perform such evaluations. The Commissioner shall appoint both evaluators, at

least one of whom shall not be employed by the hospital in which the acquittee is primarily confined. The evaluators shall determine whether the acquittee is currently mentally ill or mentally retarded and shall assess the acquittee and report on his condition and need for hospitalization with respect to the factors set forth in § 19.2-182.3. The evaluators shall conduct their examinations and report their findings separately within forty-five days of the Commissioner's assumption of custody. Copies of the report shall be sent to the acquittee's attorney, the attorney for the Commonwealth for the jurisdiction where the person was acquitted and the community services board serving the locality where the acquittee was acquitted. If either evaluator recommends conditional release or release without conditions of the acquittee, the court shall extend the evaluation period to permit the hospital in which the acquittee is confined and the appropriate community services board to jointly prepare a conditional release or discharge plan, as applicable, prior to the hearing. (1991, c. 427; 1993, c. 295; 1996, cc. 937, 980.)

The 1996 amendments. — The 1996 amendments by cc. 937 and 980 are identical, and rewrote clause (ii) in the first sentence which formerly read: "one licensed clinical psychologist or licensed psychologist registered with the Board of Psychology with a specialty in clinical services" and inserted "clinical" following "psychiatrist or" in the third sentence.

Editor's note. — The cases annotated below were decided under prior law.

Court of appeals had no jurisdiction of appeal from commitment order. — The court of appeals had no jurisdiction of an appeal from a commitment order under subsection (1) of former § 19.2-181; an examination of § 17-116.06 revealed no proceeding remotely resembling the proceeding at issue. Antzes v. Commonwealth, 13 Va. App. 172, 409 S.E.2d 172 (1991) (decided under prior law).

Court of appeals had no jurisdiction of an appeal from a subsection (1) of former § 19.2-181 commitment order, as none has been conferred by the legislature; if the hearing held under subsection (1) of former § 19.2-181 was criminal in nature, the court of appeals had no jurisdiction, as there had been no final conviction of a crime from which to appeal (see § 17-116.05:1 (i)); furthermore, conferral of jurisdiction on the court of appeals by subsection (5) of former § 19.2-181 did not apply to a commitment proceeding under subsection (1) of former § 19.2-181. Antzes v. Commonwealth, 13 Va. App. 172, 409 S.E.2d 172 (1991) (decided under prior law).

Administrative procedures under this section not proper as jury instructions. — The detailed administrative procedures to be followed by the court and the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services under this section when a defendant is acquitted by reason of insanity are directed to the court and are not the concern of the jury and thus are not proper as jury instructions. Spruill v. Commonwealth, 221 Va. 475, 271 S.E.2d 419 (1980).

Trial court properly refused to instruct jury on the consequences of a verdict of not guilty by reason of insanity although defendant argued that the jury should have been told that, pursuant to a finding of not guilty by reason of insanity, defendant would not be set free but instead would be committed to the custody of state mental health authorities. As interpreted by the Virginia Supreme Court, the language in the statute that details these consequences specifically directs itself to the attention of the court. Furthermore, the court of appeals presumed that the jury conscientiously followed the explicit cautionary instruction. Miller v. Commonwealth, 15 Va. App. 301, 422 S.E.2d 795 (1992), aff'd, 246 Va. 336, 437 S.E.2d 411 (1993) (decided under former § 19.2-181).

Commitment procedures for insanity acquittees distinguished from that for other persons. — Virginia's scheme for the commitment of insanity acquittees is different in a number of respects from its scheme for the commitment of persons other than insanity acquittees. A person other than an insanity acquittee may be committed only if the factfinder determines that there is clear and convincing evidence that the person is insane and dangerous; he is given the right to a jury trial at the precommitment stage; he is automatically released after 180 days and if the State wishes to confine him for a longer period, it must initiate a fresh commitment proceeding every 180 days; and, finally, before the 180-day period has run, he has an unlimited right to seek release. Harris v. Ballone, 681 F.2d 225 (4th Cir. 1982).

Differences in standards for incarceration constitutional. — It is not a denial of due process for a person who has committed a criminal act to be incarcerated as long as he is considered dangerous. This aspect of Virginia's scheme does not deny equal protection because a different standard (i.e., insane and dangerous) is used for persons other than insanity acquittees. The fact that an insanity acquittee

has already been shown beyond a reasonable doubt to have committed at least one dangerous act justifies the distinction Virginia has drawn. Harris v. Ballone, 681 F.2d 225 (4th Cir. 1982).

Person may not be incarcerated solely because he is insane (at least in the absence of any showing that an involuntary confinement is necessary to ensure his own survival or safety or to alleviate or cure his illness). Harris v. Ballone, 681 F.2d 225 (4th Cir. 1982).

Hearing rights of insanity acquittees generally. — While the Code of Virginia does not explicitly guarantee to insanity acquittees the right to receive advance notice of hearings, to present evidence, and to cross-examine experts, neither does it explicitly deny them. Harris v. Ballone, 681 F.2d 225 (4th Cir. 1982).

Denial of jury trial and automatic release constitutional. — The denial of a jury trial at the precommitment stage and the denial of automatic release after 180 days are clearly not unconstitutional as denying due process, nor equal protection of the laws. The fact that an insanity acquittee has already been shown beyond a reasonable doubt to have committed at least one dangerous act provides a rational basis for the distinctions drawn by the General Assembly. Harris v. Ballone, 681 F.2d 225 (4th Cir. 1982).

Standard of proof under former section held constitutional. — The requirement of subsection (3) of former section 19.2-181 that the judge be "satisfied" that the insanity acquittee qualified for commitment invoked at least the preponderance-of-the-evidence standard, and the use of that standard was constitutionally permissible. Harris v. Ballone, 681 F.2d 225 (4th Cir. 1982).

Although clear-and-convincing standard used for other committees. — The clear-and-convincing-evidence standard is required for the commitment of persons other than insanity acquittees, but the situation of an insanity acquittee is distinguishable because an insanity acquittee has already been shown beyond a reasonable doubt to have committed at least one dangerous act. Harris v. Ballone, 681 F.2d 225 (4th Cir. 1982).

One-per-year restriction does not deny equal protection. — That no similar restriction is imposed on committed persons other than insanity acquittees does not make the rule limiting applications for discharge to one-per-year unconstitutional under the equal protection clause. The obvious rationale for this restriction is to encourage the patient who has demonstrated dangerousness to cooperate with the treating physicians in curing his ills, and the General Assembly could rationally have distinguished between insanity acquittees and other committed persons in evaluating the wisdom of imposing such a restriction. Harris v. Ballone, 681 F.2d 225 (4th Cir. 1982).

Nor due process. — The force of the argument that the one-per-year restriction on applications for a release order denies due process because it creates the possibility that an insanity acquittee will remain committed for almost a year after the justification for his commitment has ceased to exist is substantially diluted by the fact that the hospital where the insanity acquittee is committed is free to apply for his release as often as it wishes. Harris v. Ballone, 681 F.2d 225 (4th Cir. 1982).

Burden of proof. — Both in habeas corpus proceedings and other statutory proceedings for the release of a person committed to a mental institution after his acquittal of a criminal offense on the ground of insanity, the burden of proving eligibility for release rests on the petitioner. Blalock v. Markley, 207 Va. 1003, 154 S.E.2d 158 (1967).

Where language of the statute improperly placed upon insanity acquitee the burden of proving, even if she was not insane, that she was not dangerous, it violated protections of the Due Process Clause. Williams v. Commonwealth, 18 Va. App. 384, 444 S.E.2d 16 (1994) (decided under former § 19.2-181).

§ 19.2-182.3. Commitment; civil proceedings. — Upon receipt of the evaluation report and, if applicable, a conditional release or discharge plan, the court shall schedule the matter for hearing on an expedited basis, giving the matter priority over other civil matters before the court, to determine the appropriate disposition of the acquittee. Except as otherwise ordered by the court, the attorney who represented the defendant at the criminal proceedings shall represent the acquittee through the proceedings pursuant to this section. The matter may be continued on motion of either party for good cause shown. The acquittee shall be provided with adequate notice of the hearing, of the right to be present at the hearing, the right to the assistance of counsel in preparation for and during the hearing, and the right to introduce evidence and cross-examine witnesses at the hearing. The hearing is a civil proceeding.

At the conclusion of the hearing, the court shall commit the acquittee if it finds that he is mentally ill or mentally retarded and in need of inpatient hospitalization. For the purposes of this chapter, mental illness includes any

mental illness, as this term is defined in § 37.1-1, in a state of remission when the illness may, with reasonable probability, become active. The decision of the court shall be based upon consideration of the following factors:

1. To what extent the acquittee is mentally ill or mentally retarded, as those terms are defined in § 37.1-1;

2. The likelihood that the acquittee will engage in conduct presenting a substantial risk of bodily harm to other persons or to himself in the foreseeable future;

3. The likelihood that the acquittee can be adequately controlled with supervision and treatment on an outpatient basis; and

4. Such other factors as the court deems relevant.

If the court determines that an acquittee does not need inpatient hospitalization solely because of treatment or habilitation he is currently receiving, but the court is not persuaded that the acquittee will continue to receive such treatment or habilitation, it may commit him for inpatient hospitalization. The court shall order the acquittee released with conditions pursuant to §§ 19.2-182.7 through 19.2-182.9 if it finds that he is not in need of inpatient hospitalization but that he meets the criteria for conditional release set forth in § 19.2-182.7. If the court finds that the acquittee does not need inpatient hospitalization nor does he meet the criteria for conditional release, it shall release him without conditions, provided the court has approved a discharge plan prepared jointly by the hospital staff and the appropriate community services board. (1991, c. 427; 1993, c. 295.)

§ 19.2-182.4. Confinement and treatment; interfacility transfers; out-of-hospital visits; notice of change in treatment. — Upon commitment of an acquittee for inpatient hospitalization, the Commissioner shall determine the appropriate placement for him, based on his clinical needs and security requirements. The Commissioner may make interfacility transfers and treatment and management decisions regarding acquittees in his custody without obtaining prior approval of or review by the committing court. If the Commissioner is of the opinion that a temporary visit from the hospital would be therapeutic for the acquittee and that such visit would pose no substantial danger to others, the Commissioner may grant such visit not to exceed forty-eight hours. The Commissioner shall notify the attorney for the Commonwealth for the committing jurisdiction in writing of changes in an acquittee's course of treatment which will involve authorization for the acquittee to leave the grounds of the hospital in which he is confined. (1991, c. 427; 1993, c. 295.)

§ 19.2-182.5. Review of continuation of confinement hearing; procedure and reports; disposition. — A. The committing court shall conduct a hearing twelve months after the date of commitment to assess each confined acquittee's need for inpatient hospitalization. A hearing for assessment shall be conducted at yearly intervals for five years and at biennial intervals thereafter. The court shall schedule the matter for hearing as soon as possible after it becomes due, giving the matter priority over all pending matters before the court.

B. Prior to the hearing, the Commissioner shall provide to the court a report evaluating the acquittee's condition and recommending treatment, to be prepared by a psychiatrist or a psychologist. The psychologist who prepares the report shall be a clinical psychologist and any evaluating psychiatrist or clinical psychologist shall be skilled in the diagnosis of mental illness and qualified by training and experience to perform forensic evaluations. If the examiner recommends release or the acquittee requests release, the acquittee's condition and need for inpatient hospitalization shall be evaluated by a second

person with such credentials who is not currently treating the acquittee. A copy of any report submitted pursuant to this subsection shall be sent to the attorney for the Commonwealth for the jurisdiction from which the acquittee was committed.

C. The acquittee shall be provided with adequate notice of the hearing, of the right to be present at the hearing, the right to the assistance of counsel in preparation for and during the hearing, and the right to introduce evidence and cross-examine witnesses at the hearing. Written notice of the hearing shall be provided to the attorney for the Commonwealth for the committing jurisdiction. The hearing is a civil proceeding.

According to the determination of the court following the hearing, and based upon the report and other evidence provided at the hearing, the court shall (i) release the acquittee from confinement if he does not need inpatient hospitalization and does not meet the criteria for conditional release set forth in § 19.2-182.7, provided the court has approved a discharge plan prepared jointly by the hospital staff and the appropriate community services board; (ii) place the acquittee on conditional release if he meets the criteria for conditional release, and the court has approved a conditional release plan prepared jointly by the hospital staff and the appropriate community services board; or (iii) order that he remain in the custody of the Commissioner if he continues to require inpatient hospitalization based on consideration of the factors set forth in § 19.2-182.3. (1991, c. 427; 1993, c. 295; 1996, cc. 937, 980.)

The 1996 amendments. — The 1996 amendments by cc. 937 and 980 are identical, and in subsection B, in the second sentence, deleted "qualified as" following "the report shall be," deleted "licensed" following "a," deleted "or licensed psychologist registered with the Board of Psychology with a specialty in clinical services" following "clinical psychologist" and inserted "clinical" following "any evaluating psychiatrist."

§ 19.2-182.6. Petition for release; conditional release hearing; notice; disposition. — A. The Commissioner may petition the committing court for conditional or unconditional release of the acquittee at any time he believes the acquittee no longer needs hospitalization. The petition shall be accompanied by a report of clinical findings supporting the petition and by a conditional release or discharge plan, as applicable, prepared jointly by the hospital and the appropriate community services board. The acquittee may petition the committing court for release only once in each year in which no annual judicial review is required pursuant to § 19.2-182.5. The party petitioning for release shall transmit a copy of the petition to the attorney for the Commonwealth for the committing jurisdiction.

B. Upon receipt of a petition for release, the court shall order the Commissioner to appoint two persons in the same manner as set forth in § 19.2-182.2 to assess and report on the acquittee's need for inpatient hospitalization by reviewing his condition with respect to the factors set forth in § 19.2-182.3. The evaluators shall conduct their evaluations and report their finding in accordance with the provisions of § 19.2-182.2, except that the evaluations shall be completed and findings reported within forty-five days of issuance of the court's order for evaluation.

The Commissioner shall give notice of the hearing to any victim of the act resulting in the charges on which the acquittee was acquitted or the next of kin of the victim at the last known address, provided the person submits a written request for such notification to the Commissioner.

C. Upon receipt of the reports of evaluation, the court shall conduct a hearing on the petition. The hearing shall be scheduled on an expedited basis and given priority over other civil matters before the court. The acquittee shall be provided with adequate notice of the hearing, of the right to be present at the hearing, the right to the assistance of counsel in preparation for and during

the hearing, and the right to introduce evidence and cross-examine witnesses. Written notice of the hearing shall be provided to the attorney for the Commonwealth for the committing jurisdiction. The hearing is a civil proceeding.

At the conclusion of the hearing, based upon the report and other evidence provided at the hearing, the court shall order the acquittee (i) released from confinement if he does not need inpatient hospitalization and does not meet the criteria for conditional release set forth in § 19.2-182.3, provided the court has approved a discharge plan prepared jointly by the hospital and the appropriate community services board; (ii) placed on conditional release if he meets the criteria for such release as set forth in § 19.2-182.7, and the court has approved a conditional release plan prepared jointly by the hospital and the appropriate community services board; or (iii) retained in the custody of the Commissioner if he continues to require inpatient hospitalization based on consideration of the factors set forth in § 19.2-182.3.

D. Persons committed pursuant to this chapter shall be released only in accordance with the procedures set forth governing release and conditional release. (1991, c. 427; 1993, c. 295.)

§ 19.2-182.7. Conditional release; criteria; conditions; reports. — At any time the court considers the acquittee's need for inpatient hospitalization pursuant to this chapter, it shall place the acquittee on conditional release if it finds that (i) based on consideration of the factors which the court must consider in its commitment decision, he does not need inpatient hospitalization but needs outpatient treatment or monitoring to prevent his condition from deteriorating to a degree that he would need inpatient hospitalization; (ii) appropriate outpatient supervision and treatment are reasonably available; (iii) there is significant reason to believe that the acquittee, if conditionally released, would comply with the conditions specified; and (iv) conditional release will not present an undue risk to public safety. The court shall subject a conditionally released acquittee to such orders and conditions it deems will best meet the acquittee's need for treatment and supervision and best serve the interests of justice and society.

The community services board serving the locality in which the acquittee will reside upon release shall implement the court's conditional release orders and shall submit written reports to the court on the acquittee's progress and adjustment in the community no less frequently than every six months. (1991, c. 427.)

§ 19.2-182.8. Revocation of conditional release. — If at any time the court which released an acquittee pursuant to § 19.2-182.7 finds reasonable ground to believe that an acquittee on conditional release (i) has violated the conditions of his release or is no longer a proper subject for conditional release based on application of the criteria for conditional release and (ii) requires inpatient hospitalization, it may order an evaluation of the acquittee by a psychiatrist or clinical psychologist, provided the psychiatrist or clinical psychologist is qualified by training and experience to perform forensic evaluations. If the court, based on the evaluation and after hearing evidence on the issue, finds by a preponderance of the evidence that an acquittee on conditional release (i) has violated the conditions of his release or is no longer a proper subject for conditional release based on application of the criteria for conditional release and (ii) is mentally ill or mentally retarded and requires inpatient hospitalization, the court may revoke the acquittee's conditional release and order him returned to the custody of the Commissioner.

At any hearing pursuant to this section, the acquittee shall be provided with adequate notice of the hearing, of the right to be present at the hearing, the

right to the assistance of counsel in preparation for and during the hearing, and the right to introduce evidence and cross-examine witnesses at the hearing. Written notice of the hearing shall be provided to the attorney for the Commonwealth for the committing jurisdiction. The hearing is a civil proceeding. (1991, c. 427; 1993, c. 295; 1996, cc. 937, 980.)

The 1996 amendments. — The 1996 amendments by cc. 937 and 980 are identical, and in the first paragraph, in clause (ii), substituted "or" for "licensed" following "acquittee by a psychiatrist," deleted "or licensed psychologist registered with the Board of Psychology with a specialty in clinical services" following "clinical psychologist" and inserted "clinical" following "provided the psychiatrist or."

§ 19.2-182.9. Emergency custody of conditionally released acquittee. — When exigent circumstances do not permit compliance with revocation procedures set forth in § 19.2-182.8, any judge as defined in § 37.1-1 or a magistrate may issue an emergency custody order, upon the sworn petition of any responsible person or upon his own motion based upon probable cause to believe that an acquittee on conditional release (i) has violated the conditions of his release or is no longer a proper subject for conditional release and (ii) requires inpatient hospitalization. The emergency custody order shall require the acquittee within his judicial district to be taken into custody and transported to a convenient location where a person designated by the community services board who is skilled in the diagnosis and treatment of mental illness shall evaluate such acquittee and assess his need for inpatient hospitalization. A law-enforcement officer who, based on his observation or the reliable reports of others, has probable cause to believe that any acquittee on conditional release has violated the conditions of his release and is no longer a proper subject for conditional release and requires emergency evaluation to assess the need for inpatient hospitalization, may take the acquittee into custody and transport him to an appropriate location to assess the need for hospitalization without prior judicial authorization. The evaluation shall be conducted immediately. The acquittee shall remain in custody until a temporary detention order is issued or until he is released, but in no event shall the period of custody exceed four hours. If it appears from all evidence readily available (i) that the acquittee has violated the conditions of his release or is no longer a proper subject for conditional release and (ii) that he requires emergency evaluation to assess the need for inpatient hospitalization, the judge as defined in § 37.1-1, or magistrate upon the advice of such person skilled in the diagnosis and treatment of mental illness, may issue an order of temporary detention authorizing the executing officer to place the acquittee in an appropriate institution for a period not to exceed forty-eight hours prior to a hearing. If the forty-eight-hour period terminates on a Saturday, Sunday or legal holiday, the acquittee may be detained until the next day which is not a Saturday, Sunday or legal holiday, but in no event may he be detained for longer than seventy-two hours or ninety-six hours when the legal holiday occurs on a Monday or Friday. For purposes of this section, a Saturday, Sunday or legal holiday shall be deemed to include the time period up to 8 a.m. of the next day which is not a Saturday, Sunday or legal holiday.

The committing court or any judge as defined in § 37.1-1 shall have jurisdiction to hear the matter. Prior to the hearing, the acquittee shall be examined by a psychiatrist or licensed clinical psychologist, provided the psychiatrist or clinical psychologist is skilled in the diagnosis of mental illness, who shall certify whether the person is in need of hospitalization. At the hearing the acquittee shall be provided with adequate notice of the hearing, of the right to be present at the hearing, the right to the assistance of counsel in preparation for and during the hearing, and the right to introduce evidence

and cross-examine witnesses at the hearing. Following the hearing, if the court determines, based on a preponderance of the evidence presented at the hearing, that the acquittee (i) has violated the conditions of his release or is no longer a proper subject for conditional release and (ii) is mentally ill or mentally retarded and is in need of inpatient hospitalization, the court shall revoke the acquittee's conditional release and place him in the custody of the Commissioner. When an acquittee on conditional release pursuant to this chapter is taken into emergency custody, detained or hospitalized, such action shall be considered to have been taken pursuant to this section, notwithstanding the fact that his status as an insanity acquittee was not known at the time of custody, detention or hospitalization. Detention or hospitalization of an acquittee pursuant to provisions of law other than those applicable to insanity acquittees pursuant to this chapter shall not render the detention or hospitalization invalid. If a person's status as an insanity acquittee on conditional release is not recognized at the time of emergency custody or detention, at the time his status as such is verified, the provisions applicable to such persons shall be applied and the court hearing the matter shall notify the committing court of the proceedings. (1991, c. 427; 1993, c. 295; 1996, cc. 937, 980.)

The 1996 amendments. — The 1996 amendments by cc. 937 and 980 are identical, and in the second paragraph, in the first sentence, inserted "or" following "examined by a psychiatrist" and deleted "or licensed psychologist registered with the Board of Psychology with a specialty in clinical services" following "licensed clinical psychologist."

§ 19.2-182.10. Release of person whose conditional release was revoked. — If an acquittee is returned to the custody of the Commissioner for inpatient treatment pursuant to revocation proceedings, and his condition improves to the degree that, within thirty days of resumption of custody following the hearing, the acquittee, in the opinion of hospital staff treating the acquittee and the supervising community services board, is an appropriate candidate for conditional release, he may be, with the approval of the court, conditionally released as if revocation had not taken place. If treatment is required for longer than thirty days, the acquittee shall be returned to the custody of the Commissioner for a period of hospitalization and treatment which is governed by the provisions of this chapter applicable to committed acquittees. (1991, c. 427; 1993, c. 295.)

§ 19.2-182.11. Modification or removal of conditions; notice; objections; review. — A. The committing court may modify conditions of release or remove conditions placed on release pursuant to § 19.2-182.7, upon petition of the supervising community services board, the attorney for the Commonwealth, or the acquittee or upon its own motion based on reports of the supervising community services board. However, the acquittee may petition only annually commencing six months after the conditional release order is issued. Upon petition, the court shall require the supervising community services board to provide a report on the acquittee's progress while on conditional release.

B. As it deems appropriate based on the community services board's report and any other evidence provided to it, the court may issue a proposed order for modification or removal of conditions. The court shall provide notice of the order, and their right to object to it within ten days of its issuance, to the acquittee, the supervising community services board and the attorney for the Commonwealth for the committing jurisdiction and for the jurisdiction where the acquittee is residing on conditional release. The proposed order shall become final if no objection is filed within ten days of its issuance. If an objection is so filed, the court shall conduct a hearing at which the acquittee,

the attorney for the Commonwealth, and the supervising community services board have an opportunity to present evidence challenging the proposed order. At the conclusion of the hearing, the court shall issue an order specifying conditions of release or removing existing conditions of release. (1991, c. 427.)

§ 19.2-182.12. Representation of Commonwealth and acquittee. — The attorney for the Commonwealth shall represent the Commonwealth in all proceedings held pursuant to this chapter. The court shall appoint counsel for the acquittee unless the acquittee waives his right to counsel. The court shall consider appointment of the person who represented the acquittee at the last proceeding. (1991, c. 427; 1993, c. 295.)

§ 19.2-182.13. Authority of Commissioner; delegation to board; liability. — The Commissioner may delegate any of the duties and powers imposed on or granted to him by this chapter to an administrative board composed of persons with demonstrated expertise in such matters. The Department of Mental Health, Mental Retardation and Substance Abuse Services shall assist the board in its administrative and technical duties. Members of the board shall exercise their powers and duties without compensation and shall be immune from personal liability while acting within the scope of their duties except for intentional misconduct. (1991, c. 427.)

§ 19.2-182.14. Escape of persons placed or committed; penalty. — Any person placed in the temporary custody of the Commissioner pursuant to § 19.2-182.2 or committed to the custody of the Commissioner pursuant to § 19.2-182.3 who escapes from such custody shall be guilty of a Class 6 felony. (1993, c. 295.)

Cross references. — As to punishment for Class 6 felonies, see § 18.2-10.

§ 19.2-182.15. Escape of persons placed on conditional release; penalty. — Any person placed on conditional release pursuant to § 19.2-182.7 who leaves the Commonwealth without permission from the court which conditionally released the person shall be guilty of a Class 6 felony. (1993, c. 295.)

Cross references. — As to punishment for Class 6 felonies, see § 18.2-10.

§ 19.2-182.16. Copies of orders to Commissioner. — Copies of all orders and notices issued pursuant to this chapter shall be sent to the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services. (1993, c. 295.)

CHAPTER 15.

TRIAL AND ITS INCIDENTS.

Article 4.1.

Trial of Capital Cases.

§ 19.2-389

Dissemination of criminal history record information

A. Criminal history record information shall be disseminated, whether directly or through an intermediary, only to:

1. Authorized officers or employees of criminal justice agencies, as defined by § 9-169, for purposes of the administration of criminal justice and the screening of an employment application or review of employment by a criminal justice agency with respect to its own employees or applicants, and dissemination to the Virginia Parole Board, pursuant to this subdivision, of such information on all state-responsible inmates for the purpose of making parole determinations pursuant to subdivisions 1, 2, 3, and 5 of § 53.1-136 shall include collective dissemination by electronic means every thirty days;

2. Such other individuals and agencies which require criminal history record information to implement a state or federal statute or executive order of the President of the United States or Governor that expressly refers to criminal conduct and contains requirements and/or exclusions expressly based upon such conduct, except that information concerning the arrest of an individual may not be disseminated to a noncriminal justice agency or individual if an interval of one year has elapsed from the date of the arrest and no disposition of the charge has been recorded and no active prosecution of the charge is pending;

3. Individuals and agencies pursuant to a specific agreement with a criminal justice agency to provide services required for the administration of criminal justice pursuant to that agreement which shall specifically authorize access to data, limit the use of data to purposes for which given, and ensure the security and confidentiality of the data;

4. Individuals and agencies for the express purpose of research, evaluative, or statistical activities pursuant to an agreement with a criminal justice agency which shall specifically authorize access to data, limit the use of data to research, evaluative, or statistical purposes, and ensure the confidentiality and security of the data;

5. Agencies of state or federal government which are authorized by state or federal statute or executive order of the President of the United States or Governor to conduct investigations determining employment suitability or eligibility for security clearances allowing access to classified information;

6. Individuals and agencies where authorized by court order or court rule;

7. Agencies of any political subdivision of the Commonwealth for the conduct of investigations of applicants for public employment, permit, or license whenever, in the interest of public welfare or safety, it is necessary to determine under a duly enacted ordinance if the past criminal conduct of a person with a conviction record would be compatible with the nature of the employment, permit, or license under consideration;

8. Public or private agencies when and as required by federal or state law or interstate compact to investigate applicants for foster or adoptive parenthood subject to the restriction that the data shall not be further disseminated by the agency to any party other than a federal or state authority or court as may be required to comply with an express requirement of law for such further dissemination;

9. To the extent permitted by federal law or regulation, public service companies as defined in § 56-1, for the conduct of investigations of applicants for employment when such employment involves personal contact with the public or when past criminal conduct of an applicant would be incompatible with the nature of the employment under consideration;

10. The appropriate authority for purposes of granting citizenship and for purposes of international travel, including but not limited to, issuing visas and passports;

11. A person requesting a copy of his own criminal history record information as defined in § 9-169 at his cost, except that criminal history record information shall be supplied at no charge to a person who has applied to be a volunteer (I) with a Virginia affiliate of Big Brothers/Big Sisters of America,(ii) with a volunteer fire company or volunteer rescue squad, (iii) as a court-appointed special advocate, or (iv) with the Volunteer Emergency Families for Children;

12. Administrators and board presidents of and applicants for licensure or registration as a child welfare agency as defined in § 63.1-195 for dissemination to the Commissioner of Social Services' representative pursuant to § 63.1-198 for the conduct of investigations with respect to employees of and volunteers at such facilities, caretakers, and other adults living in family day-care homes or homes approved by family day-care systems, and foster and adoptive parent applicants of private child-placing agencies, pursuant to § 63.1-198.1, subject to the restriction that the data shall not be further disseminated by the facility or agency to any party other than the data subject, the Commissioner of Social Services' representative or a federal or state authority or court as may be required to comply with an express requirement of law for such further dissemination;

13. The school boards of the Commonwealth for the purpose of screening individuals who are offered or who accept public school employment;

14. The State Lottery Department for the conduct of investigations as set forth in the State Lottery Law (§ 58.1-4000 et seq.);

15. Licensed nursing homes, hospitals and home care organizations for the conduct of investigations of applicants for compensated employment in licensed nursing homes pursuant to § 32.1-126.01, hospital pharmacies pursuant to § 32.1-126.02, and home care organizations pursuant to § 32.1-162.9:1, subject to the limitations set out in subsection E;

16. Licensed homes for adults, licensed district homes for adults, and licensed adult day-care centers for the conduct of investigations of applicants for compensated employment in licensed homes for adults pursuant to § 63.1-173.2, in licensed district homes for adults pursuant to § 63.1-189.1, and in licensed adult day-care centers pursuant to § 63.1-194.13, subject to the limitations set out in subsection F;

17. The Alcoholic Beverage Control Board for the conduct of investigations as set forth in § 4.1-103.1;

18. The State Board of Elections and authorized officers and employees thereof in the course of conducting necessary investigations with respect to registered voters, limited to any record of felony convictions;

19. The Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services for those individuals who are committed to the custody of the Commissioner pursuant to §§ 19.2-169.2, 19.2-169.6, 19.2-176, 19.2-177.1, 19.2-182.2, 19.2-182.3, 19.2-182.8 and 19.2-182.9 for the purpose of placement, evaluation, and treatment planning;

20. Any alcohol safety action program certified by the Commission on the Virginia Alcohol Safety Action Program for (I) assessments of habitual offenders under § 46.2-360, (ii) interventions with first offenders under § 18.2-251, or (iii) services to offenders under § 18.2-266 or § 18.2-266.1;

21. Residential facilities for juveniles regulated or operated by the Department of Social Services, the Department of Education, or the Department of Mental Health, Mental Retardation and Substance Abuse Services for the purpose of determining applicants' fitness for employment or for providing volunteer or contractual services;

22. The Department of Mental Health, Mental Retardation and Substance Abuse Services and facilities operated by the Department for the purpose of determining an individual's fitness for employment pursuant to departmental instructions;

23. Pursuant to § 22.1-296.3, the governing boards or administrators of private or parochial elementary or secondary schools which are accredited by a statewide accrediting organization recognized, prior to January 1, 1996, by the State Board of Education; and

24 Other entities as otherwise provided by law.

Upon an ex parte motion of a defendant in a felony case and upon the showing that the records requested may be relevant to such case, the court shall enter an order requiring the Central Criminal Records Exchange to furnish the defendant, as soon as practicable, copies of any records of persons designated in the order on whom a report has been made under the provisions of this chapter.

Notwithstanding any other provision of this chapter to the contrary, upon a written request sworn to before an officer authorized to take acknowledgments, the Central Criminal Records Exchange or the criminal justice agency in cases of offenses not required to be reported to the Exchange, shall furnish a copy of conviction data covering the person named in the request to the person making the request; however, such person on whom the data is being obtained shall consent in writing, under oath, to the making of such request. A person receiving a copy of his own conviction data may utilize or further disseminate that data as he deems appropriate. In the event no conviction data is maintained on the data subject, the person making the request shall be furnished at his cost a certification to that effect.

B. Use of criminal history record information disseminated to noncriminal justice agencies under this section shall be limited to the purposes for which it was given and may not be disseminated further.

C. No criminal justice agency or person shall confirm the existence or nonexistence of criminal history record information for employment or licensing inquiries except as provided by law.

D. Criminal justice agencies shall establish procedures to query the Central Criminal Records Exchange prior to dissemination of any criminal history record information on offenses required to be reported to the Central Criminal Records Exchange to ensure that the most up-to-date disposition data is being used. Inquiries of the Exchange shall be made prior to any dissemination except in those cases where time is of the essence and the normal response time of the Exchange would exceed the necessary time period. A criminal justice agency to whom a request has been made for the dissemination of criminal history record information that is required to be reported to the Central Criminal Records Exchange may direct the inquirer to the Central Criminal Records Exchange for such dissemination. Dissemination of information regarding offenses not required to be reported to the Exchange shall be made by the criminal justice agency maintaining the record as required by § 15.1-135.1.

E. Criminal history information provided to licensed nursing homes, hospitals and to home care organizations pursuant to subdivision A 15 shall be limited to the convictions on file with the Exchange for any offense specified in §§ 32.1-126.01, 32.1-126.02 and 32.1-162.9:1.

F. Criminal history information provided to licensed adult care residences, licensed district homes for adults, and licensed adult day-care centers pursuant to subdivision A 16 shall be limited to the convictions on file with the Exchange for any offense specified in §§ 63.1-173.2, 63.1-189.1 or § 63.1-194.13.